1-12-2016

Johnson v. State Amicus Curiae Dckt. 42857

IN THE SUPREME COURT OF THE STATE OF IDAHO

SARAH MARIE JOHNSON,	)	
	)	
Petitioner-Appellant,	)	NO. 42857
	)	
v.	)	Cassia Co. CV-2014-0353
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF AMICUS CURIAE

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE G. RICHARD BEVAN
District Judge

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I. INTEREST OF AMICUS

The Idaho Innocence Project ("the IIP") is part of a network of organizations operating under the umbrella of the Innocence Network ("the Network"). The shared mission of the Network and affiliates is to provide pro bono legal services to prisoners, where actual innocence may be established through post-conviction procedures and evidence. Many Network cases rely upon DNA evidence, including newly-developed DNA testing methods. The Network also seeks to prevent future wrongful convictions by pursuing legislative and administrative reform to enhance the truth-seeking function of the criminal justice system. The Network's objectives serve as an important check on the power of the state over criminal defendants and help ensure a safer and more just society.

The IIP's interest in this case is two-fold:

First, in light of its mission, the IIP has a compelling interest in ensuring that courts employ a legal framework that adequately protects criminal defendants in light of applicable statutes and judicial interpretation thereof.

Second, a central issue of this case on appeal is interpretation of I.C. § 19-4902. This statute involves a determination by the court of when DNA evidence, newly available subsequent to trial, may be tested. The use of DNA evidence lies at the very core of the IIP's mission of helping to exonerate the innocent. Indeed, such evidence and newly available testing techniques have been key to a substantial number of exonerations in which the Network have been involved. By clarifying the meaning and applicability of this statute, the IIP can more effectively apply its resources and assist those who may benefit.

II. ISSUE PRESENTED

I.C. Section 19-4902(e)(1) requires the post-conviction court to order DNA testing when, among other requirements, the result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent. The issue addressed by Amicus Curiae is narrow and is as follows:

In evaluating the potential new evidence and thereby deciding whether to order such testing, whether the district court may weigh the potential new DNA evidence against the totality of evidence produced in the underlying criminal trial.

III. STATEMENT OF THE CASE

The Amicus Curiae adopts and incorporates the Statement of the Case as presented by Petitioner/Appellant. The salient facts of concern to Amicus Curiae pertain to a single portion of the district court's Order Granting Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief ("Summary Dismissal"), dated October 23, 2014.

Idaho Code Section 19-4902(e)(1) states that the trial court shall allow DNA testing when, in addition to several conditions not in dispute here, "[t]he result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent." I.C. § 19-4902(e)(1). The court below found that no such showing could be possible due to the volume of inculpatory evidence presented at trial. Summary Dismissal at 10 – 11. (R. p. 245-246.) The court reasoned that any additional information provided by new testing would add little to the mix. (R. p. 246.)

The question to which the Amicus confines itself is whether, for the sole purpose of whether to order new DNA testing, the statutory language requires the potential result to be viewed in isolation, or

whether the judge may assess and weigh the potential evidence as compared to evidence presented at trial.

IV. ARGUMENT

THE STATUE DOES NOT ALLOW WEIGHING OF THE TRIAL EVIDENCE AGAINST THE POTENTIAL NEW EVIDENCE AND SO THE DISTRICT COURT SHOULD NOT HAVE DENIED DNA TESTING

This issue of concern to the Amicus is one of statutory construction. A sampling of comparable laws in other states is instructive. Where a post-conviction court is to weigh potential new DNA evidence against trial evidence, the statute explicitly requires the court to do so. Where a court is to consider potential new DNA evidence on its own, the statute leaves no room for interpretation to the contrary. Idaho courts have not addressed the matter directly, but several inferences may be drawn from closely related material. For example, the Idaho statute is similar in relevant respects to another state's statute and that state court has actually disallowed weighing the evidence.

1. Standard of Review

A summary dismissal of a petition for post-conviction relief is the procedural equivalent of summary judgment under I.R.C.P. 56. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The Court must determine whether a genuine issue of material fact exists. *Id.* Inferences are to be liberally construed in favor of the petitioner. *Id* Essentially, the task of this Court "is to determine whether the appellant has alleged facts in his petition that if true, would entitle him to relief." *Id.*

The interpretation of a statute is an issue of law over which the appellate court exercises free review. *Harris v. Alessi*, 141 Idaho 901, 910, 120 P.3d 289, 298 (Ct. App. 2005) (citation omitted).

When interpreting a statute, the court will construe the statute as a whole to give effect to the legislative intent. *Id.* The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *Id.*

2. Statutory Interpretation

The language of a statute should be given its plain, usual and ordinary meaning. I.C. § 73-113(1). Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. *Id.* The literal words of a statute are the best guide to determining legislative intent. *Id.* The statute must be construed as a whole. I.C. § 73-113(2). Words and phrases are construed according to the context and the approved usage of the language. I.C. § 73-113(3). See generally *State v. Spor*, 134 Idaho 315, 1 P.3d 816 (2000); *State v. McCoy*, 128 Idaho 362, 913 P.2d 578 (1996); *Harris v. Alessi*, 141 Idaho 901, 120 P.3d 289 (2005).

3. DNA Testing in General

DNA testing is allowed throughout the nation to both foster conviction of the guilty and to exonerate the innocent. There is, however, no national standard for DNA testing. The nature and availability of testing in post-conviction proceedings lies within the power and discretion of state legislatures. *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005); 24 Corpus Juris Secundum Criminal Law § 2223 (updated June 2015). A petitioner who is proceeding pursuant to a newly discovered evidence motion to have DNA evidence tested must meet the standard set forth in the governing statute, and the exact requirements differ from jurisdiction to jurisdiction. Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 Cap. U. L. Rev. 243, 260 (2003). At the least, the varying language used in the statutes and in the common law demonstrates that a defendant's right to DNA testing is not absolute and that the language states choose in setting these standards plays a critical role in a

defendant's ability to prove his innocence. Karen Christian, *"and the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 Ohio St. L.J. 1195, 1213 (2001).

Nevertheless, there are certain features common to states' post-conviction DNA testing laws. Identity must have been an issue at trial. I. C. § 19-4902(c)(1). Material to be tested must have followed a proper chain of custody. § 19-4902(c)(2). The testing would likely produce admissible evidence. § 19-4902(e)(2). Testing, *once completed and available*, must meet specified requirements toward helping establish innocence in light of trial evidence. § 19-4902(f).

The issue of concern to Amicus Curiae, and to which we confine ourselves here, is what showing is required of the potential new evidence to support an order to test for it. It is here that state to state variations are most noteworthy. Indeed, state laws may be divided into two categories: those which require the post-conviction court to weigh potential new DNA evidence against trial evidence as a prerequisite to ordering it, and those which prohibit such weighing. As will be discussed *infra*, Idaho law must be read as prohibiting such weighing.

4. Statutes Requiring a Weighing of Prospective Evidence

Those statutes which allow the post-conviction court to weigh potential new DNA evidence against criminal trial evidence are explicit on the matter. The court is generally left with no discretion.

For example, in Missouri, the post-conviction court shall order testing if "a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing." Mo. Stat. § 547.035(7)(1). Thus, the court properly denied the petitioner's motion for post-conviction DNA testing when there was overwhelming evidence at criminal trial pointing to his guilt. *State v. Belcher*, 317 S.W.3d 101, 106 (Mo. Ct. App. 2010), *rehearing denied* (June 8, 2010), *application for transfer denied* (Aug. 31, 2010). "Even if

the DNA evidence would positively exclude Movant as a donor, there is no likelihood of a different result." *Id.*

California goes a step further, permitting the post-conviction court to weigh potential new evidence as against all other evidence, whether introduced at trial or not. Cal. Penal Code § 1405(5); *Richardson v. Superior Court*, 43 Cal. 4th 1040, 1049-50, 183 P.3d 1199, 1204-05 (2008), *as modified* (July 16, 2008).

The Illinois statute is similar to Idaho's but adds a "relevancy" requirement: The trial court shall allow the testing ... upon a determination that: "[T](1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence ... even though the results may not completely exonerate the defendant..." 725 Ill. Comp. Stat. 5/116–3(1); *People v. Johnson*, 205 Ill. 2d 381, 393, 793 N.E.2d 591, 599 (2002), *as modified on denial of reh'g* (May 29, 2002). Whether the evidence would be "materially relevant" requires an evaluation of the evidence introduced at trial, as well as the evidence the defendant seeks to acquire through testing. *People v. Pursley*, 407 Ill. App. 3d 526, 534, 943 N.E.2d 98, 105 (2011).

5. Statutes Prohibiting a Weighing of Prospective Evidence

A minority of states do not permit the post-conviction court to weigh potential new DNA evidence against trial evidence. As noted *supra*, this is not a matter of judicial interpretation, but a statutory matter. Idaho, according to the wording of its statute, falls in this latter category.

In Massachusetts, a movant need only make a prima facie case that new DNA analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case. Mass. Gen. Laws ch. 278A, § 3(b)(4). The court shall allow the requested testing if it finds that such testing has the potential to result in evidence

that is material to the moving party's identification as the perpetrator of the crime in the underlying case. *Id.* at ch. 278A, § 7(b)(4).

To determine whether a moving party meets this requirement, it is necessary to consider only whether the test results could be material to the question of the identity of the person who committed the criminal act of which the moving party was convicted. *Com. v. Wade*, 467 Mass. 496, 507-08, 5 N.E.3d 816, 826 (2014). A moving party has no burden to establish that the requested analysis would have had any effect on the underlying conviction, and the motion judge is not called upon to weigh the evidence that was presented at trial against alternative theories of guilt. *Id.* at 508, 826.

The Maryland statute is similar to Idaho's. "[A post-conviction] court shall order DNA testing if the court finds that: (i) a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing." Md. Code, Crim. Proc. § 8-201(d)(1). The statute only requires a showing that the desired testing has a reasonable probability that the DNA testing has the scientific potential to produce relevant exculpatory or mitigating evidence. *Gregg v. State*, 409 Md. 698, 720, 976 A.2d 999, 1011 (2009). The petitioner is not required to show that the outcome of his case necessarily would have been different, had the jury been presented with the evidence he seeks to obtain through the requested DNA testing. *Id.* "That is why the State's argument on appeal, that the evidence at trial "overwhelmingly" established Appellant's guilt, does not defeat the *prima facie* case the petition makes for satisfaction of the requirement set forth in § 8–201(c)(1) [now (d)(1)]." *Id.*

The *Gregg* court compared the relevant statutory language with an earlier version, and thus underscored the point that potential new DNA evidence in post-conviction proceedings is to be

evaluated on its own: "The 2003 amendment also relaxed the standard the petitioner must meet to establish entitlement to testing: whereas former subsection ... required the petitioner to show that "a reasonable probability exists that the DNA testing has the scientific potential to produce results materially relevant to the petitioner's assertion of innocence," the amended subsection (c) [now subsection (d)] requires the petitioner to demonstrate a reasonable probability "that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing [.]" *Id.* at 711-712, 1006.

6. Idaho Statute

In 2001, the Idaho legislature amended Idaho's Uniform Post–Conviction Procedure Act, I.C. §§ 19–4901 et. seq., to include a claim for relief if fingerprint or DNA test results showed that the petitioner was innocent of the offense for which he or she had been convicted. Ch. 317, §§ 2 & 3, 2001 Idaho Sess. Laws 1126, 1128–30 (codified at I.C. §§ 19–4901 & 19–4902). *Fields v. State*, 151 Idaho 18, 20, 253 P.3d 692, 694 (2011). I.C. §§ 19–4902 provides as follows in relevant part:

> (b) A petitioner may, at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial. . . .
>
> (c) The petitioner must present a prima facie case that:
>
> > (1) Identity was an issue in the trial which resulted in his or her conviction; and
> >
> > (2) The evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.
>
> . . .

(e) The trial court shall allow the testing under reasonable conditions designed to protect the state's interests in the integrity of the evidence and the testing process upon a determination that:

(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and

(2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

(f) In the event the fingerprint or forensic DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief.

I.C. §§ 19–4902.

First, distinguishing 19-4902(e)(1) from 19-4902(f) is useful. Under (f), the court shall order appropriate relief (e.g. overturning the conviction and ordering a new trial) when "the fingerprint or forensic DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense...." I.C § 19-4902(f). Note the specific reference here to "in light of all admissible evidence," whereas in (e), the determination of whether to order testing, there is no such reference; new testing stands alone in subsection (e). See *Fields*, 151 Idaho 18, 253 P.3d 692, in which the Court applied subsection (f) "in light of all admissible evidence," but (e) was not at issue.

Thus, under the canon that the expression in one means the exclusion in the other, the Legislature's inclusion of weighing in (f) but not in (e) indicates an intentional omission in the latter. That is, the decision to *order* DNA evidence, as opposed how to *evaluate* it once it is obtained, must be made on the basis of the potential of that DNA evidence on its own.

Like the Maryland statute, Idaho's by its plain language makes no reference to considering potential new evidence against that produced at trial or elsewhere. Both refer to the DNA testing as

having the "scientific potential," not the legal potential (which might suggest considering the outcome of the case, i.e. weighing all evidence). Both refer to the *testing* as producing evidence.

Idaho courts have not directly addressed the weighing issue. However, a careful reading of *Nelson v. State,* 157 Idaho 847, 340 P.3d 1163 (Ct.App. 2014) *review denied* (Jan. 29, 2015), shows that the district court's approach followed Amicus Curiae's reading of the statute.

In *Nelson*, a DNA test was performed pursuant to a stipulation. One type of DNA testing (Y-STR) was performed, which is specific to males and everyone within a male line has the same Y-STR type. *Nelson*, 157 Idaho at 850, 340 P.3d at 1166. The test indicated that Nelson and his paternal line could not be excluded as contributors. *Id.* Nelson then requested a different type of test (STR) which can determine whether or not a specific person (male or female) was the source. *Id.* The district court denied further testing, pointing out that Nelson was not an expert and so his affidavits explaining why he feels the Y-STR was an inadequate test, among other things, would not be considered. *Id.* at 852, 1168. More to the point, the district court repeatedly stated that it had considered the admissible evidence presented by the Petitioner (in the light most favorable to him) and found no need for further testing of the items. *Id.* at 852-853, 1168-1169.

In other words, the district court was making its decision of whether to order further testing based solely on the evidence Petitioner presented and there is absolutely no suggestion that the court was weighing the potential DNA evidence against the trial evidence.

Nelson appealed asserting that he was entitled to further testing. *Id.* at 853, 1169. The Idaho Court of Appeals affirmed the summary dismissal because the initial DNA testing (that testing already performed and in hand) did not demonstrate Nelson's innocence, and because he did not show that additional testing was necessary because the type of testing performed was inappropriate, inadequate, and/or incorrectly performed. *Id.* at 853-854, 1169-1170. The opinion

does not indicate that any issue was raised regarding the impropriety of the trial court's weighing methodology (as opposed perhaps to the weight assigned) and the Court of Appeals did not voice any concerns or raise it on its own.

In sum, the Idaho statute by its plain language does not call for potential test results to be weighed against known evidence. Another section of the same statute does call for those test results, once obtained, to be weighed. A similarly worded statute in Maryland has specifically been ruled to not allow weighing of potential evidence. Finally, at least one district court in Idaho has followed the approach urged by Amicus Curiae and while our issue was not the focus of the appeal, neither the parties nor the Idaho Court of Appeals remarked that the district court wrong.

CONCLUSION

The trial court cannot know with certainty what the Appellant's desired testing would reveal or how it might shed light on the trial result. However, Idaho law requires only that such testing *on its own and without regard to trial evidence* has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent. Since the court below determined that such DNA results could not overcome evidence presented at trial, this Court should reverse the district court and remand this matter for further proceedings, including an order allowing the requested testing.

DATED this 17th day of December, 2015.

ATTORNEYS FOR THE AMICUS CURIAE

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/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be delivered to the following by the method indicated:

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